Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

AUTODISC, INC., a California Corporation,

Petitioner,

v.

ARDATH TALLEY, MARCIA SMITH in their individual capacities and d.b.a. MEDJUGORJE MIR CENTER, and DOES 1 through 100, inclusive,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeal of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Have the California courts so enlarged the Free Exercise First Amendment protections for matters of a religious nature by de facto exempting them entirely from civil judicial process so as to violate the Establishment Clause of the First Amendment?

2. Does the ruling of the California Appellate Court in *Autodisc v. Talley* conflict with the Supreme Court's ruling in *Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)?

CORPORATE DISCLOSURE STATEMENT

Autodisc, Inc. is owned wholly by its President and CEO, Phillip J. Kronzer, and no other party has any interest.

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INTRODUCTION

The courts of the state of California in an ill advised attempt to protect a religious group, the Medjugorje Mir Center, from an unfair competition lawsuit have violated the Establishment Clause of the First Amendment. While the state court did not articulate their reasoning the net result was an imbalance between the Free Exercise and Establishment Clauses of the First Amendment. The ruling in *Autodisc* undid a fifty year trend in California case law and is opposite to the position of the Federal Judiciary.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, *Autodisc v. Talley,* 2002 Cal. App. Unpub. LEXIS 9488, was filed October 8, 2002 [Appendix 13-21]. The Petition for Review in the California Supreme Court, *Autodisc v. Talley,* 2002 Cal. LEXIS 8705, was denied December 18, 2002 [Appendix 22].

BASIS FOR JURISDICTION

This Petition for Certiorari under Rule 10 for federal civil rights questions is timely under Rule 13.1 as less than 90 days from denial by the state court of last resort; based on 28 U.S.C. 1257(a) as an appeal from the highest state court.

STATUTORY PROVISION

This appeal is based on the tension between the Free Exercise and Establishment Clauses of the First Amendment.

STATEMENT OF THE CASE

This lawsuit was caused by a letter written to Regina Moore, who was employed at Autodisc as Kronzer's secretary. The letter was dated May 14, 1996, and purported to be from William J. O'Brien, representing a committee called "Concerned Catholic Laity." It stated that this committee intended to expose Kronzer's attacks on parish leaders and other Catholic Church officials. Moore was warned that Kronzer was conducting an evil enterprise in attacking the church and that she would be wise to separate herself from any further contamination and stop any assistance she was providing Kronzer with the writing of his letters and articles. Moore terminated her employment with Autodisc immediately upon receiving this letter.

Autodisc filed an action for fraud against Talley and Smith on October 13, 2000. The complaint alleged that Talley and Smith had written the O'Brien letter to Regina Moore, knowing its contents were false and intending to induce Moore to quit her employment with Autodisc and to disrupt Autodisc's business. It alleged that Moore's departure from Autodisc caused a temporary lapse in office security allowing other Autodisc employees to misappropriate trade secrets and other proprietary

information from Autodisc, resulting in financial damage. It alleged that at the time of the O'Brien letter Talley was still an officer of Autodisc and that her conduct violated her fiduciary duties to the corporation. A first amended complaint was filed on November 17, 2000, adding allegations regarding the Medjugorje movement and Smith's affiliation with the Medjugorje MIR Center. It alleged that Autodisc did not discover that Talley and Smith had written the O'Brien letter until late 1997.

Talley, joined by Smith, responded with an "anti-SLAPP" motion which was denied by an order of the court dated April 9, 2001. The court found that the O'Brien letter did not fall within the protection of Code of Civil Procedure (CCP) § 425.16.

Talley and Smith then filed a demurrer to the first amended complaint on May 4, 2001. On July 5, 2001, the court sustained the demurrer with leave to amend. The court noted that plaintiff may have alleged facts sufficient to support causes of action for interference with contract or breach of fiduciary duties.

Autodisc filed its second amended complaint on July 24, 2001, for breach of contract and interference with contract and alleged that Autodisc had suffered damages by having to pay unemployment benefits to Moore after she left her employment. It also alleged that Talley's fraud in assisting with the writing and delivery of the O'Brien letter was a breach of her fiduciary duties as an officer of Autodisc. It alleged that her letter of resignation as

secretary of Autodisc, tendered September 1, 1994, had not been accepted by Autodisc.

On August 16, 2001, Talley and Smith filed a demurrer to the second amended complaint, asserting that Autodisc had failed to allege facts sufficient to state claims for breach of contract and for interference with contract, and that any cause of action for interference with contract was in any event barred by the two-year statute of limitations in CCP § 339(1). In response Autodisc argued that the second amended complaint had alleged facts sufficient to state a claim for breach of fiduciary duty, and that this action was governed by a four--year statute of limitations. (CCP § 343.) Because Kronzer did not discover until late in 1997 that Talley and Smith had been responsible for the O'Brien letter, Autodisc's complaint filed in October of 2000 was therefore timely. In reply to this argument, Talley asserted that Autodisc could not pursue a claim for breach of fiduciary duty against her because she had resigned from her position as secretary in September of 1994 and was no longer an officer of the company in May of 1996, when the O'Brien letter was sent to Moore.

The demurrer was heard on September 13, 2001. The court issued a memorandum of decision sustaining the demurrer without leave to amend. The court found that Talley's resignation as an officer of Autodisc, submitted September 1, 1994, was effective even if not officially accepted by the corporation. (Corp. Code § 312(b)). Judgment was entered September 26, 2001, dismissing the case.

The trial court denied Autodisc's request to amend its complaint citing the non-applicability of the four year statute of limitations to the case. On appeal Autodisc again raised the issue of applicability of the four year statute of limitation specifically in context of the business tort of unfair competition. The Appellate Court found that the tort of unfair competition did not apply in the context of marital and religious disputes. Appellant therefore could not allege a cause of action for unfair competition. Appellant sought reconsideration on this issue which was denied as was its Petition to the California Supreme Court.

REASONS FOR GRANTING THE PETITION

A. CALIFORNIA HAS IMPERMISSIBLY EXTENDED THE FREE EXERCISE CLAUSE TO THE DETRIMENT OF THE ESTABLISHMENT CLAUSE

The California appellate court is mistaken in assuming that partially religious based disputes, that is matters with a religious background, do not overlap into the business world – in particular the realm of unfair competition. In effect the California Appellate court has granted that state's religious and quasi-religious groups carte blanche to commit business torts and dabble in matters bordering on religion without fear of being subject to unfair competition claims when it ruled the Autodisc matter involved a religious dispute and therefore a tort of unfair competition could not be applicable. *Autodisc v. Talley*, 2002 Cal. App. Unpub. LEXIS 9488 at *10, appendix 13-21.

Though "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const., Amendment 1, the California courts have gone a long way towards eroding the Establishment Clause. The California courts have granted Smith and Talley and their quasi religious entity, The Medjugorje Mir Center, the judicial equivalent of a "get out of jail free" pass. All it took was for Talley and Smith to somehow mention religion and their vendetta against Kronzer and Autodisc was immunized from civil lawsuit. Talley and Smith's actions – though cloaked in supposedly holy motives – had only one goal: to

damn Phillip J. Kronzer and Autodisc in a most ungodly manner.

It is not even clear what impermissible burden on Talley and Smith's religious activities would accrue by giving Kronzer and Autodisc their day in court. One may infer the trial court sought to protect Smith and Talley from the cost of litigation. This Court, however, has found other more financially onerous restrictions on religion to be permissible – including California sales tax in *Jimmy Swaggert Ministries vs. Board of Equalization of California*, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990).

In their zeal to protect Talley and Smith, and the Medjugorje Mir Center from Autodisc, the California courts have even ignored their own well established case law on the subject. In *Rosicrucian Fellowship v. Rosicrucian Church*, 39 Cal. 2d 121 (1952), the California Supreme Court had no difficulty sorting out issues of property and quasi-religion. Likewise in *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363 (1987), the California appellate court dealt with facts involving a controversial church under state receivership, a divorce, and a religious dispute.

California has long been willing to apply business torts – including unfair competition to religious and quasi religious parties – even when the lawsuit involved interpretation by the court of the cryptic bylaws of a secret organization and Masonic Laws. See *Most Worshipful Hiram of the*

Tyre Grand Lodge of the Ancient Free and Accepted Masons (Colored) v. Most Worshipful Sons of Light Grand Lodge Ancient Free and Accepted Masons, 94 Cal. App. 2d 25 (1949) at page 38 and affirmed in *Athens Lodge No. 70 v. Wilson*, 117 Cal. App. 2d 322, 255 P.2d 482 (1949).

On the other hand, when a central tenet of a religion is the target of government regulation, the law is unconstitutional. *Church of the Lukumi Babalu Aye, Inc. vs. City of Hilaeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). In *Church of Lukumi Babalu Aye*, the city of Hialeah, Florida unconstitutionally sought to outlaw animal sacrifices by the Santeria religion, a fusion of traditional African religion with elements of Roman Catholicism. Animal sacrifice was found to be a necessary sacrament of Santeria; but can the same be said of the activities of Tally and Smith in furtherance of the Medjugorje Mir Center? The plots of Talley and Smith were designed to ruin Autodisc and punish its president, Phillip Kronzer. Even if Talley and Smith, as adherents to the Medjugorje Cult, believed somehow their actions were justified, Autodisc should be entitled to a trial on the merits and not subject to a blanket denial of justice by the California courts.

The Federal judiciary, unlike the California courts, has had no problem sorting out the Medjugorje cult. In *Tiano vs. Dillard Department Store*, 139 F.3d 679 (9th Cir. 1997), the Ninth Circuit ruled that a sudden urge by Tiano, a department store employee, to go to the seat of the

Medjugorje cult in Bosnia Herzegovina on the spur of the moment did not qualify as a temporal mandate from God. Talley and Smith's religious motives in attacking Autodisc are even less clear than Tiano's urge to travel, but also included references to divine intervention. The California Appellate court's interpretation suggests that the mere mention of religion removes a case from its ambit; whereas, the Ninth Circuit was able to discern the truth after an in-depth inquiry. The California approach is in error.

B. *AUTODISC V. TALLEY* CONFLICTS WITH THIS COURT'S RULING IN *ALAMO FOUNDATION V. SECRETARY OF LABOR*

In *Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), this Court found that the religious nature of the Alamo Foundation did not exempt it from claims of unfair competition: "The Foundation's commercial activities, undertaken with a 'common business purpose,' are not beyond the reach of the Fair Labor Standards Act because of the Foundation's religious character, and its associates are 'employees' within the meaning of the Act because they work in contemplation of compensation." Thus Talley and Smith's plot against Autodisc, though nominally religiously inspired, cannot shield Talley and Smith from unfair competition charges.

However, the California Appellate court's blanket refusal to apply unfair competition torts to *Autodisc* seriously undermines *Alamo*. The *Autodisc* standard now espoused in California permits religious entities to engage in unfair competition torts without fear of prosecution simply because religion might come up in the course of the court action. This is exactly what this Court ruled against in *Alamo*. The *Autodisc* standard must be struck down as unconstitutional and Autodisc given its day in court.

CONCLUSION

If the ruling in *Autodisc* is permitted to stand, all religious and quasi-religious organizations will be immunized from unfair competition lawsuits in California. This is tantamount to state sponsorship of religious organizations and violates both the First Amendment and ignores previous California case law. *Autodisc* also directly conflicts with the Supreme Court's ruling in *Alamo*.

Therefore, petitioner requests that this Court grant this Petition for Writ of Certiorari to the California Court of Appeal.

Respectfully submitted,

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Filed: April 9, 2001

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
CIVIL DIVISION, SANTA CLARA FACILITY

AUTODISC, Inc., Case No. CV 793208

Plaintiff,

vs.

MEMORANDUM OF DECISION AND ORDER

ARDATH TALLEY,
MARCIA SMITH, et al.,

Defendants.

The special motion of defendant Ardath Talley (joined by Marcia Smith individually and dba Medjugorje Mir Center) to strike the complaint (CCP 425.16) and request for attorney fees was heard by the Honorable Kevin E. McKenney on March 6, 2001, at 9:00 a.m. in Department 16. The parties submitted additional briefs and the matter was submitted on March 16, 2001. Following is the decision and order of the Court.

The special motion to strike is denied.

The May 14, 1996, letter to Regina Moore is not the subject of a CCP 425.16 special motion to strike. CCP 425.16 does not protect a letter sent to one person from a fictitious author on behalf of a fictitious organization that urged the addressee to

dissociate herself from her employer. While there were free speech issues raised in the letter, the purpose was less to express religious opinions than it was to entreat Ms. Moore to discontinue her employment with plaintiff.

The court appreciates the March 9, 2001, letter brief discussing the issues raised at the March 6 hearing. However, none of the authorities cited by defendant bring the Moore letter into the protection of CCP 425.16.

The first issue raised by defendant is the right to speak anonymously or under a fictitious name, citing *Talley v. California* (1960) 362 U.S. 60. The public dissemination of written pamphlets in *Talley* distinguishes it from the letter in our case. This letter was not sent for a public purpose, but rather to persuade on person from assisting Phillip Kronzer. Further, writing the letter over a fictitious signatory on behalf of a nonexisting organization was misleading. The example of the "Letters of Junius" in the *Talley* case does not apply here. "Junius" was an obvious pseudonym and its use did not mislead the reader as to the identity of the author.

The facts of *Huntley v. Public Utilities Commission* (1968) 69 Cal.2d 67 are distinguishable from our case. *Huntley* discussed the anonymity of protesting to a public organization.

The references to penal prohibitions against use of fictitious names were not persuasive.

Finally, defendants argue that constitutionally protected free speech may include objectionable content. This court agrees. However, although the author(s) of the letter expressed protected opinions about religious issues, the goal was to terminate Ms. Moore's assistance to Mr. Kronzer.

The court concludes that this motion was not frivolous or intended to cause delay. Therefore, plaintiff is not entitled to costs or attorney's fees. [CC{ 425.16(c).]

DATED: April 9, 2001.

/s/ KEVIN E. McKENNEY
KEVIN E. McKENNEY
JUDGE OF THE SUPERIOR COURT

Filed: July 5, 2001

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
CIVIL DIVISION, SANTA CLARA FACILITY

AUTODISC, Inc., Case No. CV 793208

Plaintiff,

vs.

MEMORANDUM OF DECISION AND ORDER

ARDATH TALLEY,
MARCIA SMITH, et al.,

Defendants.

Demurrer of defendants was heard on July 21, 2001 before the Honorable Kevin E McKenney. Following is the court's order:

Timeliness

Plaintiff argued that the demurrer was untimely because defendants did not file it concurrently with their special motion to strike. In support of this proposition, plaintiff relies upon CCP 435. This argument is not well taken for several reasons. First, Section 435 governs the filing of motions to strike and does not set any deadline for filing a demurrer. Second, even if Section 435 were relevant to the timeliness of a demurrer, it would not apply because defendants never filed a motion to strike under Section 425.16. Third, the purpose of a

special motion to strike is to put a permanent end to litigation that is brought primarily to chill the valid exercise of constitutional rights. It would not make any sense to require a party to file a demurrer concurrently with a special motion to strike. Further, Section 425.16 does not prohibit the filing of a demurrer by a defendant who loses a special motion to strike. Fourth, by failing to take defendants' default, plaintiff impliedly extended defendants' deadline for filing a responsive pleading, including a demurrer. Fifth, the failure to allege facts sufficient to state a cause of action is an objection that is never waived and can be raised at any time. [See CCP 430.80(a).]

Statement of Facts

The amended complaint alleges, in pertinent part, that defendants (Talley and Smith) generated a letter, dated May 4, 1996, form a fictitious person (William J. O'Brien) on behalf of a fictitious body (Concerned Catholic Laity/San Jose Diocese). They addressed and mailed the letter to Regina Moore, a key trusted employee of plaintiff and a devout Roman Catholic. The letter falsely accused plaintiff's president (Kronzer) of sacrilegious acts and warned Moore that her employment prospects in Ireland and her soul before God would be endangered if she continued to work for plaintiff. Moore received the letter and left her employment with plaintiff. During Moore's absence, there was a temporary lapse in office security. Other employees seized upon this opportunity to steal plaintiff's trade secrets and proprietary information and give

them to plaintiff's competitors. Plaintiff suffered great financial damage. The damage suffered by plaintiff was precisely the typo of damaged that defendants intended to cause when they wrote the letter and sent it to Moore. Talley was still an officer of plaintiff when she committed these acts. As a result, she violated her fiduciary duties to plaintiff.

Request for Judicial Notice

As a preliminary matter, defendants request the Court to take judicial notice of numerous documents contained in this action and several other unrelated actions. Plaintiff objects to the request on the ground that some of the documents are irrelevant.

Technically, given that all of the documents are part of court files, the Court can take judicial notice of them. [Evid. Code 452(d).] However, the Court many not accept, as true, findings of fact made in documents contained in other cases. Nor may the court accept, as true, hearsay contained in documents other than court orders and judgments. The court may, however take judicial notice of admissions or inconsistent statements made by the plaintiff in earlier pleadings in the same action. [See Weil & Brown (2000) *Civil Procedure Before Trial*, sec. 7:14 - 7:16, p. 7-7 - 7-9.]

Most of the documents contained in the request for judicial notice are, in fact, completely irrelevant to the instant demurrer and action. The only relevant documents contained in the request

are 1) the original complaint filed i this action 2) the amended complaint filed in this action, and 3) the declaration that Talley filed in support of the special motion to strike. Defendants argue that the Court may accept, as true, that portion of Talley's declaration stating that she resigned as an officer for plaintiff in 1994. This argument is not well taken. The issue of when Talley resigned as an officer for plaintiff is a factual issue for resolution at trial. The issue was not resolved at the hearing on the special motion to strike. Accordingly, for purposes of this demurrer, the Court must accept, as true, plaintiff's allegation that Talley was still an officer in 1996 when she and Smith wrote Moore the letter in question (hereinafter the Letter).

Discussion

Defendants demur on the grounds that: 1) plaintiff does not have standing to sue for the fraud that was allegedly committed upon Moore, and 2) the fraud cause of action is uncertain.

The demurrer for uncertainty should be overruled because the first amended complaint does, in fact, plead the how, when, where and to whom and by what means the alleged fraud was committed. Specifically, defendants knowingly and falsely represented to Regina Moore that William J. O'Brien and the Concerned Catholic Laity/San Jose Diocese believed that Moore's continued employment with plaintiff and Kronzer would jeopardized her job prospects in Ireland. The false representation was made on or about May 4, 1996 in a letter

addressed to Regina Moore at plaintiff's business premises. No more specificity is required.

The general demurrer for failure to state a cause of action is a more complicated issue. Defendants focus on whether plaintiff has stated a fraud cause of action against them. However, even thought plaintiff labeled the complaint as one for fraud, it is not necessary that the cause of action be one intended by plaintiff. The test is whether the complaint states any valid claim entitling plaintiff to relief. Thus, plaintiff may be mistaken as to the nature of the case, or the legal theory on which it can prevail, but if the essential facts of some valid cause of action are alleged, the complaint is good against a general demurrer. [*Quelimane Co., Inc. v. Steward Title Guarantee Co.* (1998) 19 Cal.4th 26, 38; *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572.]

In ruling on the demurrer in this case, it is necessary to determine whether plaintiff has or can state a cause of action for fraud against these defendants. As defendants have pointed out, the fraud cause of action does not focus on them. The allegations of the amended complaint indicate that 1) plaintiff had a valid contract with Moore, 2) defendants knew of the existence of the contract, 3) defendant engaged in wrongful conduct with the intent to induce a breach of the contract, 4} the contract was breached when Moore left her employment with plaintiff, and 5) plaintiff suffered damages as a result. These allegations are sufficient to

establish a cause of action for interference with contract. [See 5 Witkin (4th ed 1997) *California Procedure*, Pleading, sec. 728, p.183.] Further, the allegation that Talley was one of plaintiff's officers when she engaged in this conduct is sufficient to support a breach of fiduciary duty cause of action against her.

However, there is no allegation that there was any misrepresentation made to plaintiff, but rather that they were made to Ms. Moore. The first amended complaint cannot support a cause of action for fraud in favor of plaintiff. While plaintiff may have alleged appropriate theories of recovery against defendants, there may be an issue as to what are th applicable statutes of limitation that may apply to causes of action for interference with contract or breach of fiduciary duty. In view of the considerations expressed above, the court sustains the demur with 30 days leave to amend.

DATED: July 5, 2001.

/s/ KEVIN E. McKENNEY
KEVIN E. McKENNEY
JUDGE OF THE SUPERIOR COURT

Filed: Sep. 26, 2001

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

AUTODISC, INC., a California Corporation,

Plaintiff,

vs.

ARDATH TALLEY, MARCIA SMITH in their individual capacities and d.b.a. MEDJUGORJE MIR CENTER, and DOES 1 through 100, inclusive,

Defendants.

No. CV 793208

JUDGMENT

It is hereby ordered, adjudged and decreed that, based upon the Order Sustaining Defendants' Demurrers Without Leave to Amend, a copy of which is attached hereto as Exhibit A and incorporated herein as if fully set forth, the action of plaintiff Autodisc, Inc., against defendants Ardath Talley and Marcia Smith is hereby dismissed with prejudice. Plaintiff Autodisc, Inc., shall take nothing and defendants Ardath Talley and Marcia Smith are hereby awarded costs of suit incurred herein.

Dated: Sep. 21, 2001. /s / KEVIN E. McKENNEY
THE HONORABLE KEVIN E. McKENNEY

EXHIBIT A

Filed: September 13, 2001

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
CIVIL DIVISION, SANTA CLARA FACILITY

AUTODISC, Inc.,

Plaintiff,

vs.

ARDATH TALLEY,
MARCIA SMITH, et al.,

Defendants.

Case No. CV 793208

MEMORANDUM
OF DECISION
AND ORDER

The demurrers of defendants were heard on September 13, 2001 before the Honorable Kevin E. McKenney. Following is the court's order:

In the second amended complaint plaintiff alleged that "Defendant Talley's attempted resignation of Autodisc, Inc. was therefore never accepted,...." The act of resignation was decisive, not the refusal of acceptance by plaintiff or Kronzer. Corporate Code 312(b) authorized defendant Talley to "resign [as an officer] at any time upon written notice to the corporation...."

In addition, Mr. Easton's comment during the demurrer hearing about receipt of the letter of

resignation was a judicial admission [*Smith vs. Walter E. Heller & Co.* (1978) 82 Cal.App.3d 259, 269.].

Therefore, the court may consider the date of the resignation in ruling on the demurrers. More than four years had passed from the date of resignation of September 1, 1994, until filing of the complaint on October 13, 2000. Applying the authority cited in plaintiff's opposition to the demurrer, the four year statute of limitation of California Code of Civil Procedure 343 bars plaintiff's claim.

It is the order of the court that the demurrers of defendants are sustained without leave to amend. This case is dismissed with prejudice. The case management conference set for November 6, 2001, is vacated.

DATED: September 13, 2001.

_____/s/_____
Kevin E. McKenney
Judge of the Superior Court

AUTODISC, INC., Plaintiff and Appellant, v. ARDATH TALLEY, et al., Defendants and Respondents.

H023798

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

2002 Cal. App. Unpub. LEXIS 9488

October 8, 2002, Filed

NOTICE:
[*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

PRIOR HISTORY:
Santa Clara County Super. Ct. No. CV793208.

DISPOSITION:
Affirmed.

JUDGES:
BAMATTRE-MANOUKIAN, ACTING P.J. WE CONCUR: WUNDERLICH, J., MIHARA, J.

OPINION BY:
BAMATTRE-MANOUKIAN

OPINION:

This is an appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend. Plaintiff Autodisc, Inc. attempted to plead causes of action for fraud, breach of contract, intentional interference with contract, and breach of fiduciary duties. The trial court found that the facts alleged did not state a cause of action for fraud and that the contract actions and breach of fiduciary duty were barred by the relevant statutes of limitations. We will affirm the judgment of dismissal.

Background

Phillip Kronzer and Ardath Talley were married for 39 years. Kronzer was the President of Autodisc, Inc., and Talley served during the marriage as an officer of the company. [*2]

Kronzer and Talley were both Catholics, active in their local parish. In 1987 they traveled to the village of Medjugorje in Bosnia, where there had been reported miraculous visions of the "Blessed Mother." Following this visit Talley became more and more involved with the Medjugorje movement. Defendant Marcia Smith was the leader of the California Medjugorje MIR Center, whose members and supporters believed in the miracle of the visions in Medjugorje. Smith and Talley became

friends. The Kronzer marriage began to deteriorate when Kronzer sought to disengage himself and his wife from the activities of the Medjugorje group and to expose Smith in the local parish as a fraud.

The dissolution of the Kronzer marriage was bitter and protracted. Talley separated from Kronzer in June of 1994. Kronzer enlisted the aid of the pastor and parishioners of the parties' church in attempts to have the marriage reconciled. He was dissatisfied with the response of the church, and expressed his dissatisfaction in letters to the local pastor, to the local bishop, and to the Vatican. He felt that the pastor and other parish representatives did not do enough to support his family during their difficulties. [*3] He believed his wife had been unduly influenced by Catholic radicals, and he personally conducted a three-year investigation into her "mysterious disappearance," publishing his findings in a lengthy report in 1997 entitled " 'Wolves in Catholics Clothing.' " The parties' divorce was final in 1997.

This lawsuit concerns a letter written to Regina Moore, who was employed at Autodisc as Kronzer's secretary. The letter was dated May 14, 1996, and purported to be from William J. O'Brien, representing a committee called "Concerned Catholic Laity." The letter stated that this committee intended to expose the truth about Kronzer's " 'pretended righteous' " attacks on parish leaders and other Catholic church officials. It warned Moore that Kronzer was conducting an "evil enterprise" in attacking the church and that she would be wise to

separate herself from "any further contamination" and stop any assistance she was providing Kronzer with the writing of his letters and articles. Moore terminated her employment with Autodisc shortly after receiving this letter.

Autodisc filed an action for fraud against Talley and Smith on October 13, 2000. The complaint alleged that Talley and Smith had written [*4] the O'Brien letter to Regina Moore, knowing its contents were false and intending to induce Moore to quit her employment with Autodisc and to disrupt Autodisc's business. It alleged that Moore's departure from Autodisc caused "a temporary lapse in office security" allowing other Autodisc employees to misappropriate trade secrets and other proprietary information from Autodisc, resulting in "great financial damage." It alleged that at the time of the O'Brien letter Talley was still an officer of Autodisc and that her conduct violated her fiduciary duties to the corporation. A first amended complaint was filed on November 17, 2000, adding allegations regarding the Medjugorje movement and Smith's affiliation with the Medjugorje MIR Center. It alleged that Autodisc did not discover that Talley and Smith had written the O'Brien letter until "late 1997."

Talley, joined by Smith, responded with a special motion to strike, pursuant to Code of Civil Procedure section 425.16 (an "anti-SLAPP" motion). This was denied by an order of the court dated April 9, 2001. The court found that the O'Brien letter did not fall within the protection of Code of Civil Proce-

dure section 425.16.

Talley and Smith [*5] then filed a demurrer to the first amended complaint, on May 4, 2001. Autodisc opposed the demurrer on grounds that it was untimely as it was not filed concurrently with the special motion to strike, and that the complaint stated a valid cause of action for fraud. On July 5, 2001, the court sustained the demurrer with leave to amend. The court found the demurrer was not untimely. It further found that there was no allegation in the first amended complaint that there were any misrepresentations made to plaintiff, Autodisc, but only to Moore. Therefore, the first amended complaint did not state a cause of action for fraud. However, the court noted that plaintiff may have alleged facts sufficient to support causes of action for interference with contract or breach of fiduciary duties.

Autodisc filed its second amended complaint on July 24, 2001, for breach of contract and interference with contract. The second amended complaint alleged that Autodisc had suffered damages by having to pay unemployment benefits to Moore after she left her employment. It also alleged that Talley's fraud in assisting with the writing and delivery of the O'Brien letter was a breach of her fiduciary duties [*6] as an officer of Autodisc. It alleged that her letter of resignation as secretary of Autodisc, tendered September 1, 1994, had not been accepted by Autodisc.

On August 16, 2001, Talley and Smith filed a

demurrer to the second amended complaint, asserting that Autodisc had failed to allege facts sufficient to state claims for breach of contract and for interference with contract, and that any cause of action for interference with contract was in any event barred by the two-year statute of limitations in Code of Civil Procedure section 339, subdivision 1. In response Autodisc argued that the second amended complaint had alleged facts sufficient to state a claim for breach of fiduciary duty, and that this action was governed by a four-year statute of limitations. (Code. Civ. Proc., § 343.) Because Kronzer did not discover until late in 1997 that Talley and Smith had been responsible for the O'Brien letter, Autodisc's complaint filed in October of 2000 was therefore timely. In reply to this argument, Talley asserted that Autodisc could not pursue a claim for breach of fiduciary duty against her because she had resigned from her position as secretary in September of 1994 and was no longer [*7] an officer of the company in May of 1996, when the O'Brien letter was sent to Moore.

The demurrer was heard on September 13, 2001, at which time counsel withdrew any cause of action for breach of contract. The court observed that the claim for interference with contract would be subject to a two year statute of limitations. The court then issued a written memorandum of decision sustaining the demurrer without leave to amend. The court found that Talley's resignation as an officer of Autodisc, submitted September 1, 1994, was effective even if not officially accepted by the corporation. (Corp. Code, § 312, subdivision

(b).) Therefore, no claim for breach of fiduciary duties for acts allegedly committed in May of 1996 could lie. Judgment was entered September 26, 2001, dismissing the case.

Standard of Review

On appeal from the dismissal of a complaint following the sustaining of a demurrer without leave to amend, the appellate court assumes the truth of all facts properly pleaded, as well as those properly the subject of judicial notice. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579, 995 P.2d 139.) We also accept as true all facts that [*8] may be implied or inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) Even though plaintiff may have mislabeled causes of action, we examine the factual allegations to determine whether they state a claim under any available legal theory. (*Saunders v. Cariss* (1990) 224 Cal. App. 3d 905, 908, 274 Cal. Rptr. 186.) Since appellant has not claimed that the court should have granted leave to amend, and has not shown how the complaint could be further amended, we need not address the question whether the trial court abused its discretion in failing to grant leave to amend.

Contentions

Appellant contends that the sending of the O'Brien letter was a form of fraud upon Regina Moore and therefore on Autodisc, the company that employed

her. Appellant argues that defendants' conduct was "at least a crime of false pretense," which would be viable as it would be subject to a three-year statute of limitations. In the alternative appellant contends that this was a case of unfair competition, in which Talley and Smith injured his business and thus gained an unfair advantage over him in the ongoing [*9] dispute involving the local parish and the Medjugorje movement.

First, appellant did not plead these theories or seek leave to amend his complaint to plead them. Furthermore, the facts as alleged are not consistent with claims of false pretenses or unfair competition. Theft by false pretenses is a theory of criminal law whereby the perpetrator makes misrepresentations intending to fraudulently deprive the victim of property and the victim gives up the property in reliance on the misrepresentations. (See, *e.g., People v. Miller* (2000) 81 Cal.App.4th 1427, 1440--1441.) Autodisc does not, and cannot, allege here that it relied upon or was induced to act by virtue of the O'Brien letter sent to its employee Moore. Unlike the case of *People v. Smith* (1984) 155 Cal. App. 3d 1103, 1145-1146, 203 Cal. Rptr. 196, relied upon by appellant, the alleged false representation here was not made to an agent of a corporation, who then caused the corporation to relinquish property in reliance on the false statement.

Appellant also relies on *Katz v. Kapper* (1935) 7 Cal. App. 2d 1, 44 P.2d 1060, an unfair competition case. *Katz* has no applicability [*10] here. That case involved commercial competitors vying for a portion

of the market. Talley and Smith were clearly not business competitors of Autodisc. The O'Brien letter arose in the context of marital disputes and religious disputes. Appellant cannot allege a cause of action for unfair competition.

Finally, appellant again raises the argument that the demurrers by Talley and Smith were untimely under Code of Civil Procedure section 435 because they were not filed at the same time as the special motion to strike. The trial court rejected this argument. The motion to strike in this case was not filed under Code of Civil Procedure section 435, but rather section 425.16. Section 425.16 does not prohibit the subsequent filing of a demurrer by a defendant who loses a special motion to strike. We find no error or abuse of discretion here.

DISPOSITION

The judgment dismissing the second amended complaint in this case is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

WUNDERLICH, J.

MIHARA, J.

AUTODISC, INCORPORATED, Plaintiff and Appellant, v. MARCIA SMITH et al., Defendants and Respondents.

S111387

SUPREME COURT OF CALIFORNIA

2002 Cal. LEXIS 8705

December 18, 2002, Filed

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Appeal from the Sixth Appellate District. No. H023798.

JUDGES:
GEORGE, Chief Justice.

OPINION:

En Banc

Petition for review DENIED.

GEORGE,

Chief Justice